IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

Insured Maintenance, LLC and Fresco Polishing LLC,

Plaintiffs,

v.

Bruce Pacquette, James F. Shoemaker, Keither L. Fredricksen and Fresco Companies Corp.,

Defendants.

File No.:

COMPLAINT

Jury Trial Demanded

Plaintiffs, Insured Maintenance, LLC and Fresco Polishing LLC for their Complaint against Defendants Bruce Pacquette, James F. Shoemaker, Keither L. Fredricksen and Fresco Companies Corp., and each of them, states as follows:

NATURE OF ACTION

1. This is an action for damages and injunctive relief arising out of Defendants' infringing, unauthorized, false and misleading use of Plaintiffs' identity, images, designations, references to organs of design and concepts and false and deceptive statements made to consumers on Defendants' brochures, notices, cards and public sites.

PARTIES

2. Plaintiff, Insured Maintenance, LLC (the "Company"), is a Minnesota limited liability company formed March 30, 2009, owned exclusively by Jason C. Richmond ("Richmond"), a Nevada resident, which maintains its principal place of business at 7841 12th Avenue S., Bloomington, Minnesota 55425.

3. Plaintiff, Fresco Polishing LLC ("Fresco Polishing"), is a Minnesota limited liability company formed February 27, 2012, owned exclusively by Richmond, which maintains its principal place of business at 7841 12th Avenue S., Bloomington, Minnesota 55425.

4. Defendant Bruce Paquette ("Paquette") is a resident of the State of Minnesota and until January 2017 he was employed by the Company as General Manager.

5. Defendant James F. Shoemaker ("Shoemaker") is a resident of the State of Minnesota and until January 2017 he was an employee of the Company.

6. Defendant Keith L Fredricksen ("Fredricksen") is a resident of the State of Minnesota and until January 2017 he was an employee of the Company.

7. Defendant Fresco Companies Corp. ("Fresco Corp.") is a Minnesota corporation formed by Paquette, Shoemaker and Fredricksen on December 23, 2016, which maintains its registered office address at 7841 12th Avenue S., Bloomington, Minnesota 55425–the same address as Plaintiffs' principal places of business in Minnesota.

8. Upon information and belief Fresco Corp. is owned by Paquette, Shoemaker and Fredricksen.

JURISDICTION AND VENUE

9. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. § 1338 and supplemental jurisdiction over the state law claims pursuant to 28 U.S.C. § 1367. Venue lies in this District under 28 U.S.C. § 1391 (b) and (c). This Court

has personal jurisdiction over Defendants. This Court has jurisdiction over each of the claims pursuant to 28 U.S.C. §§1331 and 1367, as this action arises under the Lanham Act, 15 U.S. Code § 1125 *et seq.*

10. This Court also has jurisdiction over each of the claims pursuant to 28 U.S.C. §1332. The parties are diverse and the amount in controversy exceeds $75,000.00, exclusive of interests and costs.

11. This Court has jurisdiction over Defendants because they transact business in Minnesota and are otherwise subject to jurisdiction in this state. Venue is appropriate in this judicial district under 28 U.S.C. §§1391.

12. Defendants have purposefully, continuously and systematically conducted business in Minnesota by, *inter alia,* advertising, promoting and selling their services in Minnesota. Defendants' advertising, promotion and selling is conducted primarily through highly interactive websites accessible at the domain names through which Defendants offer for sale and sell products to Minnesota residents by making deceptive and misleading statements and by infringing Plaintiffs' common law identity. Defendants thus transact business over the internet with Minnesota residents, enter into contracts with Minnesota residents via the internet, and collect payment for products from Minnesota residents via the internet. Defendants have willfully engaged in unauthorized, false and misleading uses of Plaintiffs' identity, which has caused and continues to cause harm to Plaintiffs which do business in Minnesota. Defendants continue to engage in unauthorized, false and misleading use of Plaintiffs' identity even after the nature of these uses have been brought to Defendants' attention by Plaintiffs.

FACTS

13. The Company designs and markets unique concrete grinding, polishing, staining, coloring and services, many features of which are proprietary, and janitorial services and maintenance.

14. Fresco Polishing holds the exclusive rights to the tradename "Fresco Polishing" based in part on its registration as a Minnesota company under the company name containing the tradename.

15. Fresco Polishing granted an exclusive license to the Company giving it the rights to use, market and promote the arbitrary, fanciful and non-functional term "Fresco Polishing" as a unique service in the concrete coloring, grinding, polishing, staining and coloring market in the United States.

16. Starting in 2012 the Company began doing business under the tradenames "Fresco Polishing" and "Fresco Custom Concrete".

17. Plaintiffs estimate they spent over $90,000 between 2012 and the end of 2016 to promote their services under the tradenames and trademarks "Fresco Polishing" and "Fresco Custom Concrete" and are retired to recover this amount plus costs and fees.

18. The Company advertised its tradenames in the Minnesota home and garden shows, mailings, brochures, sponsorship, radio advertising and websites.

19. As a result of the Company's continuous use of the words and phrases "Fresco Polishing" and "Fresco Custom Concrete" in Minnesota over the past five years the Company owns the common law trademarks "Fresco Polishing" and "Fresco Custom Concrete" in connection with its concrete services in Minnesota.

20. The "Fresco Polishing" and "Fresco Custom Concrete" trademarks are distinctive and suggestive and are not descriptive and are therefore valid and protectable.

21. At all relevant times Paquette, Shoemaker and Fredricksen were employees of the Company, had access to the Company's customer lists, sales information, pricing, financial records, business equipment utilized in the business, and all other proprietary information, including knowledge of the protected tradenames and trademarks.

22. From approximately 2009 until December 2016 Defendants Paquette and Shoemaker as employees of the Company (Defendant Fredricksen became an employee in 2014) were all engaged in the business of promoting the Company through marketing and advertising using the Company's protected tradenames and trademarks.

23. Upon information and belief sometime in late 2016, while still employed by the Company, Defendants Paquette, Shoemaker and Fredricksen conspired together to create a competitive enterprise and take and usurp the Company's proprietary information, customer lists, tradenames and trademarks and compete with the Company.

24. Upon information and belief Defendants Paquette, Shoemaker and Fredricksen formed Fresco Companies Corp. ("Fresco Corp.") as a Minnesota corporation on December 23, 2016.

25. The name "Fresco Companies Corp." is derived from the protected tradenames and trademarks "Fresco Polishing" and "Fresco Concrete", which are owned by the Company.

26. Fresco Corp. registration with the State of Minnesota indicates its registered office address is at 7841 12th Avenue S., Bloomington, Minnesota 55425, which is the Company's address in Minnesota.

27. Upon information and belief, Defendants Paquette, Shoemaker and Fredricksen control and direct the operations of Fresco Corp., and Fresco Corp. is the alter ego and agent of Defendants Paquette, Shoemaker and Fredricksen. Accordingly, Fresco Corp. and Defendants Paquette, Shoemaker and Fredricksen are jointly responsible for the wrongdoings alleged in this complaint.

28. Defendants do business on a regular basis through their agents and representatives in the State of Minnesota.

29. Defendants created a company with a confusingly similar tradename as that of Fresco Polishing for the purpose of confusing the public consumers as to who the consumers were dealing with and to hide the true origin of Defendants' company.

30. Defendants have publicly advertised and marketing themselves as being "Fresco Companies", "Fresco Custom Concrete", "Fresco Polishing" and other derivatives of "Fresco" in the concrete servicing marketplace. For example, Defendants have created and linked their new enterprise with the Company's tradename and trademarks on the Better Business Bureau site to confuse and mislead consumers by indicating an endorsement, sponsorship, approval or affiliation that does not exist and is misleading.

31. The Company's tradenames and trademarks represent valuable goodwill for the benefit of Plaintiffs.

32. The Company's trademarks have developed trademark significance and meaning to purchasers and potential purchasers of the Company's services. The Company's trademarks have come to indicate to purchasers that the sources they are dealing with are the creators and originators in Minnesota of the services offered by the Company.

33. Defendants' use of their company name and words and phrases that are identical to or confusingly similar to the tradename and trademarks of the Company.

34. Consumers are likely to consider Defendants' "fresco polishing" and "fresco concrete polishing" offered by "Fresco Companies Corp." to be services affiliated with those offered by Plaintiff "Fresco Polishing", creating a likelihood of confusion.

35. Due to the similarity of Plaintiff's tradename and trademarks, the addresses of the registered offices of the companies and the closely related nature of the services offered, customers and potential customers are likely to believe Defendants' services originate from Plaintiffs' resulting in a likelihood of confusion in the marketplace and damage to Plaintiffs.

36. Defendants' use of Plaintiffs' tradenames and trademarks is likely to cause confusion, mistake, or deception that Defendants' services are actually those of Plaintiffs or otherwise endorsed, sponsored, or approved by Plaintiffs causing further damage to the Plaintiffs.

37. Upon information and belief, Defendants were aware of Plaintiffs trademarks and deliberately chose the trademarks "frecso polishing" and "fresco polishing concrete" to trade upon Plaintiffs' reputation and goodwill.

COUNT I: VIOLATION OF LANHAM ACT SECTION 43(a) (False Advertising)

38. Plaintiffs repeat and hereby reallege the allegations in the paragraphs above, as if fully set forth herein.

39. Defendants market their service in interstate commerce as the same services as Plaintiffs' and intend for potential customers to believe that Defendants' services are generic equivalent to and substitute for Plaintiffs'.

40. Defendants' advertisements are literally and/or impliedly false, and misleading and in direct violation of Section 43(a) of the Lanham Act which provides in relevant part that "[a]ny person who, in connection with any goods or services . . . uses in commerce any . . . false or misleading description of fact or misleading representation of fact, which . . . in commercial advertising or promotion, misrepresents the nature, characteristics, qualities, or geographic origin of his or her or another person's goods, services, or commercial activities, shall be liable to a civil action by any person who believes that he or she is likely to be damaged by such act."

41. Additionally, Defendants are liable for false advertising under the Lanham Act because they know or have reason to know that their advertising falsely describes as generic equivalents to and substitutes for Plaintiffs' services but continue to promote and supply services that do not originate with Plaintiffs.

42. Pursuant to 15 U.S.C. §1117, Plaintiffs are entitled to damages for Defendants' Lanham Act violations, an accounting of profits made by Defendants on all sales, as well as recovery of costs and reasonable attorneys' fees incurred in this action.

43. Defendants' acts are willful, wanton, and calculated to deceive, and are undertaken in bad faith, making this an exceptional case entitling Plaintiffs to recover additional damages and its reasonable attorneys' fees pursuant to 15 U.S.C. §1117.

44. Unless enjoined by this Court, Defendants' acts will irreparably injure Plaintiffs' goodwill and erode its market share.

45. Pursuant to 15 U.S.C. §1116, Plaintiffs is entitled to preliminary and permanent injunctive relief to Defendants' continuing acts.

COUNT II: VIOLATION OF LANHAM ACT SECTION 43(a)
(Unfair Competition)

46. Plaintiffs repeat and hereby reallege the allegations of the paragraphs above, as if fully set forth herein.

47. Plaintiffs have become uniquely associated with and identified as the source for their services.

48. Defendants have marketed and continue to market Defendants' services, respectively, as being equivalent to Plaintiffs' and, in doing so, have deceived, misled and confused consumers and enabled Defendants to trade off of Plaintiffs' reputation and goodwill.

49. Defendants' acts constitute unfair competition in violation of Section 43(a) of the Lanham Act.

50. Additionally, Defendants are liable for unfair competition under the Lanham Act because they know or have reason to know that they falsely describe their services as generic equivalents to and substitutes for Plaintiffs'.

51. By reason of Defendants' conduct, Plaintiffs has suffered and will continue to suffer damage to their business, reputation, and goodwill.

52. Pursuant to 15 U.S.C. §1117, Plaintiffs is entitled to damages for Defendants' Lanham Act violations and an accounting of profits made by Defendants on sales of their services and recovery of Plaintiffs' costs of this action.

53. Defendants' acts are willful, wanton, and calculated to deceive, and are undertaken in bad faith, making this an exceptional case entitling Plaintiffs to recover additional damages and its reasonable attorneys' fees pursuant to 15 U.S.C. §1117.

54. Defendants' conduct has caused, and unless enjoined by this Court, will continue to cause immediate and irreparable harm to Plaintiffs for which there is no adequate remedy at law, and for which Plaintiffs is entitled to injunctive relief.

COUNT III: VIOLATION OF THE MINNESOTA UNFAIR TRADE PRACTICES ACT, MINN. STAT. § 325D.13

55. Plaintiffs repeat and hereby reallege the allegations of the paragraphs above, as if fully set forth herein.

56. Minn. Stat. § 325D.13 provides that: "No person shall, in connection with the sale of merchandise, knowingly misrepresent, directly or indirectly, the true quality, ingredients or origin of such merchandise."

57. Minn. Stat. §§ 8.31, subd. 3a, and 325D.15 provide a private right of action to enforce the provisions of Minn. Stat. § 325D.13.

58. Defendants have, in connection with the sale of their services, respectively, knowingly misrepresented their true quality and ingredients.

59. Defendants' false and misleading representations of fact and conduct have deceived or misled, or have a tendency to deceive or mislead, a substantial and appreciable segment of consumers.

60. Upon information and belief, Defendants' false and misleading representations of fact and conduct have influenced purchasing and substitutions decisions, or are likely to influence purchasing and substitution decisions for Defendants' services.

61. By reason of Defendants' false and misleading representations of fact and conduct, Plaintiffs have suffered and will continue to suffer damage to their business, reputation and goodwill.

62. Pursuant to Minn. Stat. §§ 8.31 and 325D.15, Plaintiffs are entitled to enjoin Defendants' unlawful conduct as well as recover damages, costs and disbursements, and reasonable attorneys' fees.

COUNT IV: VIOLATION OF THE MINNESOTA UNIFORM DECEPTIVE TRADE PRACTICES ACT, MINN. STAT. § 325D.44

63. Plaintiffs repeat and hereby reallege the allegations of the paragraphs above, as if fully set forth herein.

64. Minn. Stat. § 325D.44, subd. 1, provides that: A person engages in a deceptive trade practice when, in the course of business, vocation, or occupation, the person: (1) passes off goods or services as those of another; (2) causes likelihood of confusion or of misunderstanding as to the source, sponsorship, approval, or certification of goods or services; (3) causes likelihood of confusion or of misunderstanding as to affiliation, connection, or association with, or certification by, another; . . . (5) represents that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities that they do not have or that a person has a sponsorship, approval, status, affiliation, or connection that the person does not have; . . . (7) represents that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another; . . . (13) engages in any other conduct which similarly creates a likelihood of confusion or of misunderstanding.

65. Minn. Stat. § 325D.45 provides a private right of action to enforce the provisions of Minn. Stat. § 325D.44.

66. In the course of their business, Defendants, by and through their false and misleading representations of fact and conduct concerning their services, respectively, have engaged in and continue to engage in deceptive trade practices in violation of Minnesota Statute section 325D.44.

67. Defendants have willfully engaged in their actions regarding Defendants' services, respectively, knowing them to be deceptive.

68. By reason of Defendants' conduct, Plaintiffs have suffered and will continue to suffer damage to their business, reputation and goodwill.

69. Pursuant to Minn. Stat. § 325D.45, Plaintiffs are entitled to enjoin Defendants' unlawful conduct as well as costs and reasonable attorneys' fees.

COUNT V: VIOLATION OF THE MINNESOTA FALSE ADVERTISING ACT, MINN. STAT. § 325F.67

70. Plaintiffs repeat and hereby reallege the allegations of the paragraphs above, as if fully set forth herein.

71. Minn. Stat. § 325F.67 provides that: Any person … who, with intent to sell … merchandise, … makes, publishes, disseminates, circulates, or places before the public, … in this state, in a newspaper or other publication, or in the form of a book, notice, handbill, poster, bill, label, price tag, circular, pamphlet, program, or letter, or over any radio or television station, or in any other way, an advertisement of any sort regarding merchandise, … which advertisement contains any material assertion, representation, or statement of fact which is untrue, deceptive, or misleading, shall, whether or not pecuniary or other specific damage to any person occurs as a direct result thereof, be guilty of a misdemeanor, and any such act is declared to be a public nuisance and may be enjoined as such.

72. Minn. Stat. § 8.31, subd. 3a provides a private right of action to enforce the provisions of Minn. Stat. § 325F.67.

73. Through their marketing and advertising, Defendants have intentionally and willfully made, published, disseminated, circulated and placed before the public advertisements containing false, deceptive, and misleading statements about Defendants' services in the context of commercial marketing in the State of Minnesota and elsewhere.

74. By reason of Defendants' conduct, Plaintiffs have suffered and will continue to suffer damage to its business, reputation and goodwill.

75. Pursuant to Minn. Stat. § 8.31, subd. 3a, Plaintiffs are entitled to enjoin Defendants' unlawful conduct as well as damages, costs and disbursements, and reasonable attorneys' fees.

PRAYER

WHEREFORE, Plaintiffs pray that:

1. The Court enter orders preliminarily and permanently enjoining Defendants and their agents, servants, employees, attorneys, successors, and assigns, and all others in active concert or participation with them, from directly or indirectly falsely advertising or promoting Defendants' concrete services;
2. The Court enter orders preliminarily and permanently enjoining Defendants and their agents, servants, employees, attorneys, successors, and assigns, and all others in active concert or participation with them, from directly or indirectly falsely advertising or promoting Defendants' services;
3. The Court enter orders preliminarily and permanently enjoining Defendants and their agents, servants, employees, attorneys, successors, and assigns, and all others in active concert or participation with them, from making or inducing others to make any false, misleading or deceptive statement of fact, or representation of fact in connection with the promotion, advertisement, display, sale, offering for sale, manufacture, production, circulation or distribution of

Defendants' services in such fashion as to suggest that such services are equivalent or in any way endorsed by or associated with Plaintiffs';

4. The Court enter orders preliminarily and permanently enjoining Defendants and their agents, servants, employees, attorneys, successors, and assigns, and all others in active concert or participation with them, from making or inducing others to make any false, misleading or deceptive statement of fact, or representation of fact in connection with the promotion, advertisement, display, sale, offering for sale, manufacture, production, circulation or distribution of Defendants' services in such fashion as to suggest that such services are equivalent or in any way endorsed by or associated with Plaintiffs';
5. Defendants be ordered to include in any advertisement or promotion of Defendants' services, whether oral or written, a notice in location and typeface as prominent as the comparison itself, that "[Defendants' services by name] are not services of Plaintiff which created such services. Therefore, the substitution of such services may violate state law";
6. Defendants be ordered to include in any advertisement or promotion of Defendants' services, whether oral or written, a notice in location and typeface as prominent as the comparison itself, that "[Defendants' services by name] are not equivalent to Plaintiffs'. Therefore, the substitution of Defendants' services for Plaintiffs' may violate state law";
7. Defendants be ordered to take corrective action to correct any erroneous impression persons may have derived concerning the nature, characteristics or

qualities of Defendants' services including without limitation the placement of corrective advertising to prevent the inducement of others from substituting Defendants' services for Plaintiffs';

8. Defendants be ordered to take corrective action to correct any erroneous impression persons may have derived concerning the nature, characteristics or qualities of Defendants' services including without limitation the placement of corrective advertising to prevent the inducement of others from substituting Defendants' for services of Plaintiffs';
9. Plaintiffs be granted such other relief as the Court may deem appropriate to prevent the trade and public from deriving any erroneous impression concerning the nature, characteristics or qualities of Defendants' services or from inducing others to substitute Defendants' services for Plaintiffs';
10. The Court enter an order requiring Defendants to pay Plaintiffs damages in the amount of Plaintiffs' actual and consequential damages and any profits of Defendants resulting from their advertisements and marketing;
11. The Court enter an accounting of profits made by Defendants on all sales;
12. The Court enter an order finding that this is an exceptional case and requiring Defendants to pay Plaintiffs additional damages equal to three times the actual damages awarded Plaintiffs pursuant to 15 U.S.C. §1117(a);
13. The Court enter an order requiring Defendants to pay Plaintiffs all of their reasonable attorneys' fees, costs and expenses, including those available under

15 U.S.C. §1117(a), Minn. Stat. § 325D.45, Minn. Stat. § 325D.15, Minn. Stat. § 8.31, subd. 3a, and any other applicable law;

14. The Court enter an order awarding Plaintiffs prejudgment and post-judgment interest on any monetary award in this action; and
15. The Court enter an order awarding Plaintiffs such other and further relief, as the Court deems just and equitable.

DEMAND FOR JURY TRIAL

Plaintiffs demand a trial by jury on all issues so triable.

Dated: July 20, 2017

By: ______________________

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